Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a corporation be convicted of conspiring with itself under the general federal conspiracy statute, 18 U.S.C. § 371?

2. Has this Court implicitly overruled the traditional common-law rule that a jury cannot convict a party of conspiracy while simultaneously acquitting an indispensable party to that conspiracy?

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, Inc., was appellant below. Respondent, the United States of America, was appellee below.

Pursuant to this Court's Rule 29.1, petitioner notes that it is a wholly-owned subsidiary of GM Hughes Electronics Corporation ("GMHE"). GMHE, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of GMHE are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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PETITION FOR WRIT OF CERTIORARI

Hughes Aircraft Company, Inc., respectfully petitions for a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming Hughes' conviction of conspiracy under 18 U.S.C. § 371.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 20 F.3d 974 (1994) and is reprinted at Appendix ("App.") 1a -12a.

The District Court's unreported order denying Hughes' Motion For Judgment Of Acquittal Or New Trial is reprinted at App. 14a-28a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 28, 1994. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on May 13, 1994. App. 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Hughes Aircraft Co., Inc., contracted with the United States Government to deliver weapons systems containing "hybrids," sophisticated microelectronic components. The contract required, among other things, that Hughes conduct environmental screening tests on each hybrid. These tests were carried out at a Hughes division in California where one Donald LaRue worked as a line foreman.

In January 1992 the Government indicted both LaRue and Hughes on (1) two counts of making false statements to the United States in violation of 18 U.S.C. § 1001, and (2) one count of conspiring to defraud and to make false statements to the United States in violation of the general federal conspiracy

statute, 18 U.S.C. § 371.[1] The Government charged that LaRue had conspired with four other Hughes employees—two immediate supervisors, Jim Temple and Frank Saia, and two immediate subordinates, Margaret Goodearl and Marion Tolby—either to conduct certain environmental screening tests improperly or to skip them altogether.[2] There was no allegation that the conspiracy had extended beyond these employees, or that any of them had acted for private personal gain.[3]

After Hughes unsuccessfully moved to dismiss the conspiracy count on the ground that a corporation could neither conspire with its own employees nor be held liable for a conspiracy entirely among them, Hughes and LaRue were tried jointly in June 1992. The jury acquitted LaRue on all counts, and acquitted Hughes on the false-statement counts. Inexplicably, however, the jury convicted Hughes on the conspiracy count.

The District Court (Byrne, J., C.D. Cal.) denied Hughes' motion for judgment of acquittal or new trial. App. 14a - 28a. Although the court described the jury's conspiracy verdicts as "stark[ly] inconsisten[t]," *id.* 28a, it held that controlling Ninth Circuit precedent precluded all challenges based on verdict inconsistency. *Id.* 25a - 26a (citing *United States v. Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987)). Applying the

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[1] The indictment also included a number of additional counts later severed from those at issue here. Trial of these other counts awaits final resolution of this case.

[2] There is absolutely *no* evidence, however, that these alleged testing improprieties concealed or contributed to any performance failure in a product delivered to the United States Government. Indeed, notwithstanding its six-year investigation of Hughes, the Government to this day has taken no action to recall any product manufactured or tested by the company during the period covered by the indictment.

[3] The jury instructions specified that Hughes could be found guilty of conspiracy only if the jury found that LaRue had conspired with one or more of the four unindicted alleged co-conspirators, all Hughes employees. *See infra* n.9.

then-prevailing alternative fines provisions of the criminal code, 18 U.S.C. §§ 3622 and 3623, the Court subsequently sentenced Hughes to a fine of $3.5 million.

Hughes appealed. To hold a corporation vicariously liable for a conspiracy entirely among its own employees, Hughes argued, would be to hold it liable for conspiring with itself. That result would defy not only logic but the text of § 371 and the well-established "intracorporate conspiracy" doctrine that formed part of the legal background against which the statute was enacted. And even if the intracorporate conspiracy doctrine did not apply, Hughes' conspiracy conviction still could not be sustained in light of the jury's acquittal of an indispensable party to the alleged conspiracy.

The Ninth Circuit, however, affirmed Hughes' conviction and sentence. App. 1a - 12a. The court derided the corporation's construction of § 371 as "creative," *id.* 7a, "implausible," *id.*, and "illogical," *id.* 9a—*not* because it conflicted with the provision's text or history, but because, in the court's view, that construction "would undermine the *purpose* of the statute," *id.* (emphasis added), and conflict with "public policy," *id.* 8a. And the acquittal of an indispensable party to the conspiracy did not doom Hughes' conspiracy conviction, the court held, because of the general rule that verdict inconsistency is no ground for reversal. *Id.* 3a - 7a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT A CORPORATION CAN BE HELD LIABLE FOR CONSPIRING WITH ITSELF, EXACERBATING CONFUSION AMONG THE LOWER COURTS.

A. A Corporation Cannot Be Convicted Of Conspiracy Based Entirely On The Acts Of Its Own Employees.

This case involves elementary principles of statutory construction. Courts are not free to interpret statutes—and particularly not criminal statutes—to accord with their own "public policy" views. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1453-54 (1994). While discerning a statute's meaning is by no means a mechanical or invariably straightforward task, the opinion below does not even go through the motions of careful analysis. By casually relying on statutory "purpose" and "public policy," the Ninth Circuit significantly eroded the frail limits constraining the voracious conspiracy crime. As Justice Jackson warned years ago, "the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U.S. 440, 449 (1949) (concurring opinion). The opinion below ignored not only textual and historical limitations on conspiracy, but also Justice Jackson's wise advice.

The statute at issue here, 18 U.S.C. § 371, is the general conspiracy provision in the federal criminal code. Its text reveals the absurdity of holding a corporation vicariously liable for a conspiracy entirely among its own employees. Section 371 provides that if "two or more persons conspire . . . each" shall be fined or imprisoned. Obviously, the "two or more persons" necessary for a conspiracy must be *separate* entities,

because "each" cannot be punished if they are the same. A single corporation cannot simultaneously stand in the shoes of *all* parties to a conspiracy—as a matter of logic and language, it cannot be "two or more persons" and "each" of those persons at once.

But it would be a mistake to view this case as involving no more than the application of rules of grammar or usage, for § 371 is hardly a newcomer to the United States Code. The statute "is the descendant of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867." *Tanner v. United States*, 483 U.S. 107, 128 (1987).[4] And the crime of conspiracy was a familiar part of the Anglo-American legal landscape long before then, having emerged in English law in the early 14th century. *See generally* R. Wright, The Law of Criminal Conspiracies and Agreements (1873); 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.4 at 60-61 (1986).

The established common-law definition of conspiracy, of course, provides important guidance to the statute's meaning. As this Court has long emphasized, when Congress codifies a common-law concept "in which [is] accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Evans v. United States*, 112

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[4] The Act of March 2, 1867, 14 Stat. 484, provided as follows:

> [I]f two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to impriso[n]ment not exceeding two years.

S. Ct. 1881, 1885 (1992); *Molzof v. United States*, 112 S. Ct. 711, 716 (1992). That interpretive approach represents a practical recognition that Congress does not write on a blank slate, and presumably does not intend to reinvent Anglo-American jurisprudence from scratch each and every time it legislates.

Although precise formulation of the crime of conspiracy has varied over the years, its essence has remained the same—an agreement between two or more persons to achieve an unlawful objective. *See generally* Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922). The element of plurality lies at the heart of the crime—"[a] conspiracy must be by two persons at least: one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown." 3 F. Wharton, Criminal Law § 2339 at 87 (6th ed. 1868).

When applied to natural persons, the plurality requirement is unproblematic; "[t]he impossibility of one person forming a combination with himself is too obvious for discussion." R. Perkins, Criminal Law 537 (1957). But the law has long defined "persons" to include artificial entities made up of *multiple* natural persons. The corporation is one such entity; for centuries, a corporation and its managers have been "considered as one person in law." 1 W. Blackstone, Commentaries *468 (1765); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4884 at 361 (Zajdel ed. 1986).

At common law, the rule was (and remains) that artificial persons, like natural persons, cannot conspire with themselves. *See, e.g.*, 3 F. Wharton, Criminal Law § 2343 at 88 (6th ed. 1868).[5] A corporation, thus, can neither conspire

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[5] *See also* 15A C.J.S. Conspiracy § 37 at 731 (1967); *Rutherfoord v. Presbyterian-University Hosp.*, 612 A.2d 500, 508 (Pa. Super. 1992); (continued...)

with its own employees nor be held liable for a conspiracy entirely among them. This "familiar doctrine," *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978) has long been applied to define the scope of conspiracies proscribed by a variety of federal statutes. *See, e.g., Hull v. Cuyahoga Valley Joint Vocational School Dist.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1991) (civil rights conspiracy); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 & n.15 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (RICO conspiracy); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (antitrust conspiracy); *Jaglieski v. Package Machine Co.*, 489 F. Supp. 232, 233-34 (E.D. Pa. 1980) (common-law conspiracy in product liability case).

Indeed, this Court looked to the common law to decide the analogous question whether spouses could be convicted of conspiring together. *United States v. Dege*, 364 U.S. 51 (1960). Early common law held that a husband and wife could not make up the plurality necessary for a conspiracy, because marriage had united them into a single legal unit. *See, e.g.*, 1 Hawkins, Pleas of the Crown 351 (6th ed. 1788). The *Dege* Court, however, held that this rule had been "swept away . . . long *before* the originating conspiracy Act of 1867 was passed." 364 U.S. at 54 (emphasis added). Because, in the Court's view, the spousal conspiracy doctrine was an anachronism by the time the federal conspiracy statute was first enacted, Congress could not be deemed to have intended to incorporate the doctrine into the statute. "[W]e cannot infuse into the conspiracy statute a *fictitious attribution* to Congress of regard for the medieval

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[5] (...continued)
Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 5 (Tex. App. 1991); *Day v. General Electric Credit Corp.*, 546 A.2d 315, 318-19 (Conn. App. 1988); *Merkel Assocs. v. Bellofram Corp.*, 437 F. Supp. 612, 618 (W.D.N.Y. 1977) (New York law).

notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of to obedience to [the law]." *Id.* at 54-55 (emphasis added). Chief Justice Warren, in dissent, agreed with the Court that the relevant inquiry in construing § 371 was the state of conspiracy jurisprudence in 1867, but strongly contested the Court's description thereof. *Id.* at 55-58.

The Ninth Circuit, as noted above, decided this case not on the basis of statutory text or history, but rather on considerations of "public policy" and statutory "purpose." It would be silly, that court declared, to construe the statute to "'*shield* a corporation or its agents from criminal liability where its agents acted on its behalf.'" App. 8a (quoting *United States v. Peters*, 732 F.2d 1004, 1008 n.7 (1st Cir. 1984) (emphasis in original)). "If we applied the intracorporate conspiracy doctrine to this case, *no* corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." *Id.* 8a - 9a (emphasis added).

Putting aside the obvious impropriety of construing a criminal statute on policy grounds, *cf. Central Bank of Denver*, 114 S. Ct. at 1453-55, those policy arguments are flawed. The intracorporate conspiracy doctrine is far narrower than the Ninth Circuit supposed. It does not challenge the established rule that a corporation can be held vicariously liable for civil or criminal conspiracy—as long as that conspiracy is not limited entirely to its own agents or employees, but involves some other independent entity. *See, e.g., Joplin Mercantile Co. v. United States*, 213 F. 926, 936 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915). A corporation might even be found guilty of conspiring with one or more of its own agents or employees where the latter acted not on the corporation's behalf, but for their own ends. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 & n.15 (1984); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4884 at 369 (1993). And of course the corporation's

employees can *themselves* be convicted of conspiracy. *See*, e.g., *Cohen v. United States*, 157 F. 651, 653-54 (2d Cir.), *cert. denied*, 207 U.S. 596 (1907); 5 S. Thompson, Commentaries on the Law of Private Corporations § 5632 at 465 (2d ed. 1910). Contrary to the Ninth Circuit's assertion, thus, the intracorporate conspiracy doctrine does not "shield" corporations from the law of conspiracy. It simply recognizes that the liability of the conspirators cannot invariably be *extended* to the corporation—a corporation cannot, as a matter of law, simultaneously stand in the shoes of all parties to a conspiracy.

B. The Opinion Below Exacerbates Confusion In The Lower Courts Regarding Application Of The Intracorporate Conspiracy Doctrine.

The opinion below exacerbates the considerable confusion and inconsistency in the lower courts about the status of the intracorporate conspiracy doctrine in federal law. As the United States Code contains some 300 separate conspiracy provisions, that confusion cuts broadly across statutory lines. And the disarray is as deep as it is broad, showing no signs of abating without this Court's intervention.

The opinion below adds the Ninth Circuit to two others (the Sixth and Eleventh) that, at least in *dicta*, have stated that corporations *can* be convicted of conspiracy under 18 U.S.C. § 371 based entirely on the acts of their own employees. *See United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) *(per curiam)*; *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990) *(dictum)*; *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464

U.S. 935 (1983); *United States v. Hartley*, 678 F.2d 961, 970-72 (11th Cir. 1982) *(dictum)*, *cert. denied*, 459 U.S. 1170 (1983).[6]

After first adopting that position, *see United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984), the First Circuit has since rejected it. In *United States v. Notarantonio*, 758 F.2d 777, 789-90 (1st Cir. 1985), that court, relying on antitrust conspiracy precedents, applied the intracorporate conspiracy limitation to § 371. Because a "corporation cannot conspire with its own employees," the court explained, the corporate conspiracy conviction in that case was proper *only* because one of the other conspirators was an independent party. 758 F.2d at 790.

The Ninth Circuit recognized that by refusing to construe § 371 in light of the traditional intracorporate conspiracy doctrine, its interpretation of the statute conflicted with cases construing *other* conspiracy provisions in federal law. The court, however, attempted to distinguish these cases by asserting that: (1) the antitrust conspiracy cases are based on unique policies, *see* App. 8a; *see also Stevens*, 909 F.2d at 432-33; *S & Vee Cartage*, 704 F.2d at 920; *Hartley*, 678 F.2d at 970-71; and (2) other cases involve civil, not criminal, conspiracy, *see* App. 8a - 9a; *see also Mahar*, 801 F.2d at 1488 & n.19; *American Grain*, 763 F.2d at 320; *Peters*, 732 F.2d at 1008 & n.7; *S & Vee Cartage*, 704 F.2d at 920; *Hartley*, 678 F.2d at 971-72. The simple assertion of these distinctions, of

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[6] The Sixth and Eighth Circuits, similarly, have refused to apply the intracorporate conspiracy doctrine when construing other criminal conspiracy provisions in the U.S. Code. *See, e.g., United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (construing Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1986); *United States v. American Grain & Related Indus.*, 763 F.2d 312, 320 (8th Cir. 1985) (construing Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(d)); *United States v. Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986) (construing Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 846).

course, does not make them correct or meaningful. They are neither.

With respect to the first asserted distinction, it is well-established that § 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits conspiracies in restraint of trade, does not reach entirely intracorporate agreements. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752; *Nelson Radio*, 200 F.2d at 914. Although that result can be, and has been, justified in part by reference to antitrust policies, its traditional justification is the more fundamental principle that the employees of a single firm do not provide the plurality of actors necessary for a conspiracy. "It is *basic in the law of conspiracy* that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio*, 200 F.2d at 914 (emphasis added); *see also Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 (9th Cir. 1979). It puts the cart before the horse, thus, to contend that the intracorporate conspiracy doctrine "first arose" in "the antitrust context." *Stevens*, 909 F.2d at 432.

The second attempted distinction—between civil and criminal cases—is even more contrived. As an initial matter, the notion that criminal conspiracy provisions should be read *more broadly* than their civil counterparts is wildly counterintuitive. The rule of lenity, firmly-rooted in Anglo-American law, teaches that criminal statutes are, if anything, to be construed more, not less, strictly than their civil analogues. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.). Courts surely turn that rule on its head when they refuse to apply the intracorporate conspiracy doctrine in criminal cases precisely *because* they are criminal cases. As a corollary to the rule of lenity, furthermore, the common law traditionally held that the scope of a corporation's vicarious liability should be *narrower*

in the criminal than in the civil context. *See, e.g., Nobile v. United States*, 284 F. 253, 255 (3d Cir. 1922).

At any rate, the purported civil/criminal distinction has less than firm support in the caselaw. The Courts of Appeals, for example, are split on whether corporations can be held liable for purely intracorporate conspiracies in civil actions brought under one of the Nation's oldest civil-rights laws, the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985. The Seventh Circuit, in an opinion by then-Judge Stevens, held in 1972 that they cannot. *See Dombrowski v. Dowling*, 459 F.2d 190, 196. *Dombrowski* has since been followed by five other circuits.[7] These cases do not turn on considerations unique to § 1985—which, in relevant part, tracks the conspiracy language of § 371—but on general conspiracy principles, and particularly on the bedrock principle that a corporation cannot conspire with itself. If a conspiracy provision in a broadly remedial *civil rights* statute implicitly excludes intracorporate conspiracies, then it follows *a fortiori* that a materially identical conspiracy provision in a *criminal* statute must too. *Cf. Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1027-32 (1994); *see also id.* at 1034-35 (opinion concurring in judgment).

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[7] *See Hull v. Cuyahoga Valley Joint Vocational School Dist.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1983); *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 109 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 60 (1991); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1371 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989); *Buschi v. Kirven*, 775 F.2d 1240, 1251-53 (4th Cir. 1985); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156-57 (8th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978); *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66, 70-71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974); *see also Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 508 (4th Cir. 1974) (opinion concurring in result).

The Third Circuit, however, has refused to interpret § 1985 in light of traditional intracorporate conspiracy principles, expressly disagreeing with the line of cases noted above. *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir. 1978) *(en banc)*, *vacated on other grounds*, 442 U.S. 366 (1979). And that disagreement has been echoed by the First Circuit, in an opinion by then-Judge Breyer. *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984). This Court has expressly reserved the question. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 n.11 (1979); *see also Hull v. Shuck*, 111 S. Ct. 2917 (1991) (White, J., dissenting from denial of *certiorari*) (noting split).

Relying on an alleged civil/criminal distinction to explain which conspiracy provisions in federal law should be deemed to include an implicit intracorporate conspiracy limitation, thus, is problematic as a matter of logic and precedent. And the distinction falls apart completely in light of those conspiracy provisions with *both* civil and criminal applications. Indeed, 42 U.S.C. § 1985, the civil-rights conspiracy statute discussed above, has a criminal-law twin, 18 U.S.C. § 241. And § 1 of the Sherman Act, of course, is both civil and criminal.

Yet another such dual-purpose conspiracy provision is found in the Rackeeter Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*[8] Not surprisingly, the lower courts are in complete disarray over whether RICO's conspiracy provision applies to purely intracorporate conspiracies. Most courts have declined to permit such liability in civil conspiracy cases—again, not on any ground unique to

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[8] RICO, in pertinent part, makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). The statute also proscribes conspiracies to violate its substantive provisions. *Id.* § 1962(d).

RICO, but because of fundamental common-law conspiracy principles. "'A corporate conspiracy also requires more than the collective judgment of two individuals within the same entity, for their conduct, if challenged, becomes that of the single, corporate entity.'" *Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1287 (D.V.I. 1987) (quoting *Jagielski v. Package Machine Co.*, 489 F. Supp. 232, 233 (E.D. Pa. 1980)); *see also Palmer v. Nationwide Mut. Life Ins. Co.*, 945 F.2d 1371, 1373, 1376 (6th Cir. 1991); *Medallion TV Enters. v. SelecTV of California*, 627 F. Supp. 1290, 1301 n.7 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1510-12 (D.N.J. 1985); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541-42 (W.D. Pa. 1984); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 97 (E.D. Pa. 1983); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 209 (E.D. Mich. 1981).

Several of these cases state in *dicta* that the opposite result would obtain in a criminal RICO conspiracy. *Lewaetz*, 653 F. Supp. at 1287 n.13; *McLendon*, 602 F. Supp. at 1511. Noting that RICO and Sherman Act conspiracies are "analogous," however, the Fourth Circuit has applied the intracorporate conspiracy doctrine even in a criminal RICO case. *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 & n.15 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). "[W]e would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon." *Id.* at 1190.

Other courts, in contrast, have refused to apply the intracorporate conspiracy doctrine to RICO, primarily on the (misguided) theory that the doctrine is limited to the antitrust context. *See, e.g., Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 403 & n.22 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Pandick, Inc. v. Rooney*,

632 F. Supp. 1430, 1435 (N.D. Ill. 1986); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983). And at least one Court of Appeals has refused to apply the intracorporate conspiracy doctrine to a *criminal* RICO conspiracy. *United States v. Hartley*, 678 F.2d at 986 & n.41.

The notion that a single statutory provision can bear multiple meanings is at best far-fetched, even if that provision has both civil and criminal applications. *See, e.g., United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959); *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). Indeed, Justice Scalia, joined by the Chief Justice, Justice O'Connor, and Justice Kennedy, has made precisely this point with respect to RICO. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (opinion concurring in judgment). Usually, of course, the point is made to narrow a statute's scope in the civil context because of its possible application in the criminal context. Here, however, the point only underscores the folly of purporting to interpret conspiracy provisions in federal law *more* broadly in criminal than in civil cases.

The question whether a corporation can be convicted of conspiring with its own employees is an important and recurring one in federal law. It has long percolated among the lower courts, generating ever greater confusion. The time is ripe for this Court to impose some order in this unruly corner of the law. As a prescient judge noted long ago, "[t]he law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." *Mifflin v. Commonwealth*, 5 Watts & S. (Pa.) 461 (1843) (Gibson, C.J.).

II. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE CONVICTION OF ONE CO-CONSPIRATOR CAN BE UPHELD DESPITE THE ACQUITTAL OF AN INDISPENSABLE PARTY TO THE CONSPIRACY, EXACERBATING A SPLIT AMONG THE CIRCUITS.

The Ninth Circuit also erred by upholding Hughes' conspiracy conviction despite the same jury's acquittal of LaRue, an indispensable party to any such conspiracy. Relying on this Court's precedents rejecting challenges based on verdict inconsistency, the court below held that LaRue's acquittal did not preclude Hughes' conviction because "the conviction of one co-conspirator is valid even when all the other co-conspirators are acquitted." App. 5a - 6a.[9] That conclusion exacerbates a split among the Courts of Appeals on the need for verdict consistency in conspiracy cases.[10]

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[9] There can be no question that the jury's verdicts convicting Hughes of conspiracy while acquitting LaRue were, as the District Court put it, "stark[ly] inconsisten[t]." App. 28a. This case involved an alleged "wheel" conspiracy with LaRue at its hub—he was a necessary party to any conspiracy. That is why, as the court explained, "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy *only* if LaRue was found to have conspired with one of four unindicted Hughes employees." App. 14a (emphasis added). Accordingly, the jury was instructed that a conspiracy would have to consist of "LaRue, and at least one of the [four] unindicted co-conspirators, namely James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby." App. 31a. As the District Court noted, the Government presented no evidence that would sustain Hughes' conspiracy conviction on any other theory. App. 14a. *Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) *(per curiam)* (jury verdicts may be upheld only on theories presented to jury, not speculative *post hoc* rationalizations).

[10] Because Hughes is a corporation, the issue of verdict consistency in this case merges with the issue of vicarious liability. An artificial entity like a corporation cannot *itself* enter into a conspiracy, *see, e.g., United States v. Stevens*, 909 F.2d at 433-34; *United States v. Peters*, 732 F.2d at 1008 n.6; *United States v. Carroll*, 144 F. Supp. 939, 942-43 (S.D.N.Y. 1956); its

(continued...)

It is certainly true that, as a general matter, verdict inconsistency is no ground for reversing a conviction. The Supreme Court set forth this rule as early as 1932, *Dunn v. United States*, 284 U.S. 390 (Holmes, J.), and reaffirmed it more than half a century later in *United States v. Powell*, 469 U.S. 57 (1984). But that rule has never been absolute.

To the contrary, it has long co-existed alongside another traditional doctrine—the "rule of consistency" in conspiracy law. A conspiracy inherently involves two or more people; this plurality requirement makes the crime virtually unique. *See, e.g., Feder v. United States*, 257 F. 694, 697 (2d Cir. 1919) (suggesting that reason for rule of consistency in conspiracy cases is "the indivisibility of the crime for which a plurality of defendants are tried"); *cf. Iannelli v. United States*, 420 U.S. 770, 773-86 (1975); *Krulewitch v. United States*, 336 U.S. 440, 443-58 (1949) (Jackson, J., concurring); *United States v. Andrews*, 850 F.2d 1557, 1570-71 (11th Cir. 1988) *(en banc)* (Clark, J., dissenting), *cert. denied*, 488 U.S. 1032 (1989). From well before the time the federal conspiracy statute was passed—indeed, from well before the American colonies were settled or proclaimed their independence, *see, e.g., Marsh v. Vauhan*, 78 Eng. Rep. 937 (Q.B. 1599); *R. v. Grimes*, 87 Eng. Rep. 142 (K.B. 1688)—the established rule in Anglo-American common law was that a person could not be convicted of conspiracy if all alleged co-conspirators were acquitted. *See, e.g.*, 3 F. Wharton, Criminal Law § 2339 at 87 (6th ed. 1868)

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[10] (...continued)
participation is inherently vicarious. Thus, as the District Court recognized, *see supra* n.9, and explained to the jury, App. 30a - 31a, Hughes itself could not conspire with LaRue or any other individual; the corporation could be held liable for conspiracy, if at all, only because of the acts of its agents or employees. The acquittal of LaRue is flatly inconsistent with the notion that any of the four other potential co-conspirators could have conspired, and that inconsistency necessarily infects the same jury's conspiracy verdict against the corporation. Vicarious liability obviously cannot, as a matter of law or logic, exceed the underlying liability on which it is based.

("in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other"); *see also* J. Hawley & M. McGregor, Criminal Law 103 (3d ed. 1899); 2 J. Bishop, Criminal Law § 188 at 130 (9th ed. 1923).

This Court's decisions in *Dunn* and *Powell* in no way purported to overturn the traditional rule of consistency in conspiracy law. Neither case, in fact, provided any opportunity to do so—both involved challenges to a jury's inconsistent verdicts on multiple counts against a *single defendant*. Indeed, this Court recognized and applied the rule of consistency in a number of cases after *Dunn*. *Hartzel v. United States*, 322 U.S. 680, 682 n.3 (1944) (plurality opinion), for example, held that it was legally "impossible" to sustain a conspiracy conviction upon the acquittal of all alleged co-conspirators. *See also Morrison v. California*, 291 U.S. 82, 93 (1934) (conspiracy legally "impossible" where sole alleged co-conspirator acquitted); *United States v. Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring) (conspiracy conviction must be reversed when necessary co-conspirators acquitted); *cf. Harris v. Rivera*, 454 U.S. 339, 345 & n.13 (1981) *(per curiam)* (contrasting general rule that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside" with *Hartzel*'s application of rule of consistency in cases involving acquittal of all alleged co-conspirators but one); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 246 (1940) *(dictum)* (where conspiracy conviction "necessarily dependent" on the participation of an acquitted party, conviction cannot stand).

Both before and after *Dunn*, moreover, the Courts of Appeals routinely acknowledged the rule of consistency in conspiracy cases. *See, e.g., Feder v. United States*, 257 F. 694, 696-97 (2d Cir. 1919); *Miller v. United States*, 277 F. 721, 726 (4th Cir. 1921); *Rosenthal v. United States*, 45 F.2d 1000, 1003 (8th Cir. 1930); *Worthington v. United States*, 64 F.2d 936, 939 (7th Cir. 1933); *Farnsworth v. Zerbst*, 98 F.2d 541, 544 (5th Cir. 1938); *United States v. Fox*, 130 F.2d 56, 57 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942); *Apodaca v. United States*,

188 F.2d 932, 940 (10th Cir. 1951); *United States v. Lubin*, 313 F.2d 419, 423 (9th Cir. 1963); *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974); *United States v. Bosch-Morales*, 677 F.2d 1, 3 (1st Cir. 1982) (per panel including Breyer, J.) To the limited extent these courts even considered the relationship between the rule of consistency in conspiracy cases and *Dunn*, they deemed the former a "limited" but "well-recognized" exception to the latter. *United States v. Duz-Mor Diagnostic Lab., Inc.*, 650 F.2d 223, 226 n.3 (9th Cir. 1981); *Bosch-Morales*, 677 F.2d at 3; *Apodaca*, 188 F.2d at 940.[11] Indeed, academic commentary routinely analyzed the rule of consistency in conspiracy cases without noting or suggesting any tension with *Dunn*'s general inconsistent-verdicts rule. *See, e.g.*, Developments in the Law—Conspiracy, 72 Harv. L. Rev. 920, 972-74 (1959).

Although this Court's opinion in *Powell* neither involved nor purported to call into question the rule of consistency, many Courts of Appeals interpreted it as the rule's death knell. In *Powell*'s wake, five Circuits (the First, Fourth, Fifth, Ninth and Eleventh) overruled earlier precedents applying the longstanding common-law rule. *See United States v. Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992) *(en banc)*; *United States v. Bucuvalas*, 909 F.2d 593, 595-97 (1st Cir. 1990); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States v. Andrews*, 850 F.2d 1557, 1561-62 (11th Cir. 1988) *(en banc)*, *cert. denied*, 488 U.S. 1032 (1989); *United States v. Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987). These courts simply imported *Powell*'s general tolerance of inconsistent verdicts into the law

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[11] Indeed, *Dunn*'s analysis consisted largely of a quotation from a Second Circuit opinion, *Steckler v. United States*, 7 F.2d 59, 60 (1925), *see* 284 U.S. at 393—but the latter's author, Judge Learned Hand, apparently perceived no inconsistency between *Dunn*'s general rule and the narrower principle that "[i]f [a conspiracy] verdict had left only one defendant who could be guilty, undoubtedly it could not stand." *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir.) (L. Hand, J.), *cert. denied*, 279 U.S. 863 (1929) (citing *Feder v. United States*, 257 F. 694 (2d Cir. 1919)).

of conspiracy, without regard for the latter's unique context and history.

Another five Circuits (the Second, Third, Seventh, Eighth, and District of Columbia) have not expressly abrogated the rule of consistency in light of *Powell*, but have hinted at an inclination to do so. *United States v. Garcia*, 882 F.2d 699, 704-05 (2d Cir.), *cert. denied*, 493 U.S. 943 (1989); *United States v. Velasquez*, 885 F.2d 1076, 1091 n.13 (3d Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *Government of the Virgin Islands v. Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *see also id.* at 142-43 (Garth, J., concurring); *United States v. Mancari*, 875 F.2d 103, 104-05 (7th Cir. 1989); *Cortis v. Kenney*, 995 F.2d 838, 840-41 & n.2 (8th Cir. 1993); *United States v. Dakins*, 872 F.2d 1061, 1065 (D.C. Cir.), *cert. denied*, 493 U.S. 966 (1989).

In the Tenth Circuit, however, the rule of consistency appears to have survived *Powell*. In *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990), the court challenged the proposition that *Powell* had abolished the rule, noting that *Powell* did "not discuss *Hartzel* or expressly overturn the traditionally recognized exception." The *Suntar Roofing* court, however, had no occasion to resolve the issue definitively, as not all alleged co-conspirators in the case had been acquitted. In two subsequent cases the court again noted, but had no occasion to resolve, the issue. *United States v. Sasser*, 974 F.2d 1544, 1561 & n.8 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1063 (1993); *United States v. Howard*, 966 F.2d 1362, 1363-64 & n.2 (10th Cir. 1992).

The Sixth Circuit also recognizes the continued vitality of the traditional rule of consistency after *Powell*. In *United States v. Boling*, 884 F.2d 924 (6th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990), the court reaffirmed "[t]he controlling circuit principle . . . that '[w]here all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld,'" *id.* at 925 (quoting *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974)). Relying

on *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir. 1986), another post-*Powell* case, the court simply held that the rule did not apply where an indispensable co-conspirator was not actually acquitted, but simply dismissed or retried. In no way did either *Boling* or *Sachs* so much as hint that this Court's opinion in *Powell* had altered longstanding circuit law.

Thus, in the short decade since *Powell*, the lower courts have veered from virtually unanimous acceptance of the centuries-old rule of consistency toward its virtually complete annihilation. It cannot seriously be doubted that the rule formed part of the common-law background against which 18 U.S.C. § 371 was enacted. Congress, therefore, presumably understood and ratified it. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Yet in the mad dash to proclaim the rule's demise, not a single court of appeals has paused to ponder its pedigree, or its longstanding peaceful coexistence with the general rule condoning verdict inconsistency. This Court should now resolve the uncertainty in the lower courts and clarify whether *Powell* truly sought to abolish the rule of consistency. Such a hoary tenet of the common law does not deserve the shabby treatment it has been accorded over the past decade--and, at the very least, courts should not add insult to injury by treating inconsistent verdicts inconsistently.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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